No. 85-5939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EULOGIO CRUZ,

Petitioner,

v.

NEW YORK,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals
Of The State Of New York

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Respondent's threshold argument is that this Court need not decide whether limiting instructions, that the nontestifying codefendant's videotaped confession was not admissible against petitioner, were adequate to protect petitioner's Confrontation Clause rights. The State asserts, instead, that this confession would have been *substantively* admissible against petitioner pursuant to this Court's recent decision in *Lee* v. *Illinois*, 476 U.S. ___, 106 S.Ct. 2056 (1986). In an *amicus* brief, the United States makes the same argument.

This Court should decline to follow this suggested disposition, as it was not presented to or passed upon by any of the state trial or appellate courts, and was not presented in respondent's opposition to the petition for certiorari. Nor, precisely because of respondent's failure to raise the question in the state courts, does this Court have an adequate factual record upon which to review this claim.

Even if this Court should decide to undertake the factual review of the entire record, including the codefendant's pretrial suppression hearing, that respondent suggests, the State has still not met its heavy burden, under *Lee*, of overcoming the videotape's presumptive unreliability as to petitioner's guilt. In fact, if the record portions to which respondent selectively cites are relevant at all, on fuller examination they contain indicia not of the videotape's reliability, but of its unreliability as evidence *connecting petitioner to the crime*.[1] These

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[1] In arguing the reliability of the videotaped confession as to petitioner's role in the crime, respondent relies heavily on petitioner's purported "concession" in his New York State Court of Appeals brief that the confession was "truthful" (Resp. Br., pp. 22, 25 n., 28). No such confession was made, respondent's highly selective quotation

sources also demonstrate precisely how petitioner could have made a meaningful assault on the codefendant's videotaped accusations, had he been given the opportunity to cross-examine him.

ARGUMENT

POINT I

RESPONDENT'S CLAIM, RAISED FOR THE FIRST TIME BEFORE THIS COURT, THAT THE CODEFENDANT'S VIDEOTAPED CONFESSION WAS SO RELIABLE AS TO BE ADMISSIBLE AS SUBSTANTIVE EVIDENCE AGAINST PETITIONER, IS NOT PROPERLY OR ADEQUATELY PRESENTED FOR THIS COURT'S REVIEW.

This Court has consistently applied the "not pressed or passed on" rule to bar the State, as respondent, from raising legal grounds to support a judgment where those grounds had not been presented to, passed on by, or adequately developed in, the state courts.

For example, in *Steagald* v. *United States*, 451 U.S. 204, 209 (1981), this Court refused to consider a "standing" claim proffered by the respondent government that had not been developed in the lower courts. Similarly, in

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notwithstanding. Petitioner did argue in that brief, as he does before this Court, that, in contrast to the sparse detail contained in petitioner's alleged confession, the codefendant's videotaped confession contained details remarkably consistent with the physical evidence at the scene. Thus, it would have "seemed" to the jury (Petitioner's Brief to the New York Court of Appeals, p. 28) that the videotape contained the truth. That is precisely the prejudice suffered by petitioner in this case. For while the videotaped confession contained self-verifying details as to *modus operandi*, it contained no such indicia of reliability of its assertion that petitioner was present at the scene of the crime (*Id.* at 19). Yet the jury was likely to have used that confession in weighing petitioner's connection to the crime, limiting instructions notwithstanding.

Hayes v. *Florida*, 470 U.S. ___, 105 S. Ct. 1643, 1646 n.1 (1985), the Court declined to reach the respondent State's "inevitable discovery" argument, as it was never raised in the state courts. As in those cases, this Court should decline to address the issue which respondent seeks now to inject into this case for the first time.

Aside from general federalism concerns, *see, e.g.*, *Illinois* v. *Gates*, 462 U.S. 213, 221 (1983), this result is required here because "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969); *see also Michigan* v. *Tyler*, 436 U.S. 499, 512 n.7 (1978).

Having foregone the heavy burden in the state courts of demonstrating the videotape's reliability as evidence connecting petitioner to the crime, respondent attempts to meet that burden now by gleaning selected portions of the proceedings below, including facts which were adduced only at the codefendant's suppression hearing and never came before the judge or jury that convicted petitioner. Most significantly, petitioner's trial attorney had neither reason nor opportunity to elicit or marshal the evidence to rebut respondent's belated claim of reliability, since the admissibility or reliability of the videotape as evidence *connecting petitioner to the crime* was never then at issue.

The procedural posture of this case is thus distinguishable from that in *Lee* v. *Illinois*, 106 S. Ct. at 2056, and *New Mexico* v. *Earnest*, 476 U.S. ___, 106 S. Ct. 2734 (1986). In both cases, the codefendant's confession had been used as substantive evidence in the state trial court to convict the defendant. Accordingly, the question in state court, and hence the question reviewed by this Court, was whether this use was consistent with the Confrontation

Clause. *Lee*, 106 S. Ct. at 2061; *see State* v. *Earnest*, 103 N.M. 95, 703 P.2d 872, 875-876 (1985). In petitioner's case, the admissibility of the videotape as substantive evidence against petitioner has not been put in issue until now.

Petitioner, in reliance on respondent's position in the trial court, had no opportunity to help frame or contribute to the record on this issue. Moreover, because respondent similarly failed to advance its current position throughout the state appellate process, the state courts have had no opportunity to pass upon the question as a matter of state law.[2] Thus, as respondent's failure to raise the claim throughout the state courts deprived petitioner of the opportunity to develop the record or to assert potentially dispositive state procedural bars, it would be manifestly unfair to petitioner to determine, at this late stage, respondent's claim.

POINT II

THE EXISTING RECORD DOES NOT SUPPORT RESPONDENT'S CLAIM THAT THE VIDEOTAPED CONFESSION BEARS SPECIAL INDICIA OF RELIABILITY AS EVIDENCE CONNECTING PETITIONER TO THE CRIME.

Respondent urges that the record is clear that the codefendant's videotaped accusations against petitioner bear special indicia of reliability. Should this Court enter-

[2] For example, had respondent pressed the claim in either state appellate court, it would have been disposed of on state procedural grounds, *i.e.*, forfeiture due to respondent's failure to raise the claim in trial court. *See, e.g., People* v. *Nieves*, 67 N.Y.2d 125, 135-136, 492 N.E.2d 109, 115-116 (1986). Such a procedural bar would then have constituted an adequate and independent state ground barring review by this Court. *See Michigan* v. *Tyler*, 436 U.S. 499, 512 n.7 (1978).

tain this belated claim, petitioner contends that even the existing record fails to support respondent's contention; in fact, the record strongly suggests that petitioner could have marshalled a convincing argument at the trial level, had he reason or opportunity to do so, that the videotape was not sufficiently reliable evidence connecting him to the crime.

A. Respondent Incorrectly Claims That The Videotaped Confession Would Have Been Admissible Against Petitioner Under A "Firmly Rooted Hearsay Exception": Declarations Against Penal Interest.

Respondent argues that the codefendant's videotaped confession was independently admissible against petitioner under a "firmly rooted hearsay exception"—declarations against penal interest—and that such admissibility eliminates any Confrontation Clause concerns (Resp. Br. p. 29; *Amicus* Br. p. 13). The *Lee* Court, deeming such declarations "too large a class for meaningful Confrontation Clause analysis," rejected this very argument. 106 S. Ct. at 2064 n.5. This judgment was eminently correct.

Furthermore, whether the codefendant's videotaped accusations connecting petitioner to the crime were admissible as "declarations against penal interest" is a question of New York State evidentiary law, and New York's declaration against penal interest doctrine would have barred the codefendant's videotaped accusations against petitioner from evidence against him. Respondent's failure to cite any New York cases to support its current claim of admissibility is understandable: New York imposes at least two separate obstacles to admissibility, under its version of the hearsay exception, that are apparently not contained in (for example) the

federal rule upon which the government so strenuously relies in its *amicus* brief.

First, under New York law, extra safeguards have been imposed where an accomplice's confession pursuant to police interrogation is sought to be admitted against the defendant as a declaration against penal interest. In *People* v. *Geoghegan*, 51 N.Y.2d 45, 409 N.E.2d 975 (1980), the Court of Appeals held that, before such declarations can be admissible against a criminal defendant, the State has to prove not only that the declarations were against penal interest, but also that the declarant was not on notice as to the benefits of falsifying. Unless the State could show that the accomplice did not cooperate with the police or have any motive to gain their favor, courts are to presume that the declarant was motivated by a desire to gain leniency.[3] Based on this holding, at least one New York commentator has observed:

> Although the Court of Appeals has not mandated exclusion of all inculpatory declarations against penal interest made by accomplices in the atmosphere of police interrogation, clearly few, if any, declarations could pass the strict standards imposed in *Geoghegan*.

Goodman, *Hearsay Rule for Declarations Against One's Penal Interest*, N.Y.L.J., Aug. 12, 1981, at p. 1, cols. 2-3, p.2, cols. 1-6, p. 3, col. 1. Since the codefendant in this case was cooperating with the police at the time he made the videotaped confession, the videotape's admission against petitioner would have been barred under *Geoghegan*.

The second hurdle imposed by New York law, where a declaration against penal interest is sought to be intro-

[3] In so holding, the *Geoghegan* majority rejected the dissent's reasoning that the accomplice's confession was so reliable as to be admissible pursuant to *Ohio* v. *Roberts*, 448 U.S. 56 (1980). 51 N.Y.2d at 52; 409 N.E.2d at 978.

duced against a criminal defendant, is that only the *self*-incriminatory portions of the declaration are admissible; all references to the defendant's involvement are inadmissible. Thus, if A makes a declaration against penal interest that A and B committed murder, that portion of A's declaration which mentions B must be deleted. *People* v. *Geoghegan*, 51 N.Y.2d at 49, 409 N.E.2d at 976; *People* v. *Maerling*, 46 N.Y.2d 289, 298, 385 N.E.2d 1245, 1250 (1978); *People* v. *Josan*, 92 A.D.2d 902, 459 N.Y.S.2d 897 (N.Y. App. Div., 2d Dept. 1983). Prince, *Richardson On Evidence*, § 260 (10th ed.) (Cumulative Supp. 1972-1985, p. 115). Thus, under this rule, those portions of the videotape which placed petitioner at the scene of the homicide would have to have been deleted prior to any admission of it as a declaration against penal interest.

Therefore, even assuming the codefendant's videotaped confession was against what he knew at the time to be his penal interest (but see pp. 8-11, *post*), the videotape's accusations against petitioner were inadmissible under New York's own "firmly rooted" declaration against penal interest doctrine. If any further evidence of this is needed, it lies in respondent's decision not to offer them into evidence under that theory at petitioner's trial.[4]

[4] An additional requirement under New York law is that the criminal defendant be allowed to elicit the entire circumstances under which the declaration was made in order to show that the "criteria for admission" under the declaration against penal interest doctrine are "illusory" in his particular case. *People* v. *Maerling*, 46 N.Y.2d at 298-299, 385 N.E.2d at 1251. Petitioner had no such opportunity, since respondent did not offer the videotape into evidence against him. Under New York's rules of appellate procedure, therefore, petitioner's judgment could not be affirmed on appeal on the ground that it was a declaration against penal interest, since it was not admitted as such in trial court. *People* v. *Nieves*, 67 N.Y.2d 125, 135-136, 492 N.E.2d 109, 115-116 (1986). Since respondent would have been barred procedurally from raising this issue in the New York

Therefore, respondent's bald assertion that the videotape "must be deemed to be extremely reliable" evidence against petitioner since it "falls within 'a firmly rooted hearsay exception'" (Resp. Br. p. 29), is a singularly hollow one.

B. Respondent's Claim That The Videotaped Confession Was Inherently Reliable As Evidence Of Petitioner's Guilt Is Not Supported By The Record.

Respondent claims that the codefendant's videotaped confession was "inherently reliable" (Resp. Br. p. 20) as evidence of petitioner's involvement in the crime, since it heaped blame upon its declarant and, in a display of "fraternal loyalty" (Resp. Br. p. 27), sought to minimize petitioner's guilt. A close examination of the minutes of the codefendant's suppression hearing, to which respondent has selectively cited in making its argument, actually displays the codefendant Benjamin in a misguided, and

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appellate courts, this Court should also not review it. *See Michigan* v. *Tyler*, 436 U.S., 512 n.7 (1978).

Furthermore, the issue of whether Benjamin was "unavailable" as a witness for the purposes of New York's "penal interest" exception was never litigated in the state courts. The People never called Benjamin to the stand, outside the jury's presence, to determine if Benjamin would refuse to testify. New York courts consider a witness unavailable for the purposes of this hearsay exception when he refuses to testify *when called to the stand*, *e.g.*, *People* v. *Settles*, 46 N.Y.2d 154, 167, 385 N.E.2d 612, 619 (1978); *People* v. *Brown*, 26 N.Y.2d 88, 91, 257 N.E.2d 16, 17 (1970); however, whether New York would deem a codefendant unavailable pursuant to this hearsay exception where he did not assert his Fifth Amendment privilege on the witness stand, but probably would have done so had he been called, is still an open question. Respondent's failure to litigate this availability question at the trial level has deprived the state appellate courts the opportunity to rule on it *as a matter of state law*.

increasingly self-defeating attempt to shift blame away from himself.

At the hearing, Detective Wood testified that the Cruz brothers (Eulogio, Benjamin, and two other brothers) became "suspects" in the Jerry Cruz homicide (H. 15, 18).[5] Additionally, Wood learned from Jerry Cruz's brother, Norberto, that Benjamin, Eulogio, and two others (Chevy Figueroa and Elliot Perez)[6] were involved in the instant gas station robbery/homicide (H. 19, 21-22). Wood passed out business cards to people in the area and spread the word that he wanted to speak to Benjamin about the Jerry Cruz homicide (H. 17).

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[5] Numbers preceded by "H" refer to the pages of the codefendant's pretrial hearing, dated May 25, 1983.

[6] The *dramatis personae* contained in Norberto's statement to the police contrasts with the one contained in Benjamin's videotaped confession. Benjamin reported in that confession that he, Eulogio, "Pacho" and Jerry Cruz were involved (J.A. 65-66). Norberto apparently omitted his brother's name from the list and added one or two others. Obviously, either or both of these two "witnesses," whom respondent claims to be reliable, lied in these statements to the police about who was present at the robbery.

Even more significantly, the delayed timing of Norberto's decision to "tell all" to Detective Wood strongly suggests that it was based upon a desire for revenge against Eulogio and Benjamin for their role in Jerry's death, which role was so notorious that even the police knew about it. If, as respondent argues, Norberto "never even entertained the notion that his childhood friend could be involved in" Jerry's death (Resp. Br. pp. 49-50), then he was the only person in the Bronx who had not "entertained" that notion. Since Norberto kept Jerry's involvement in the robbery from Detective Wood even after Jerry's death, Norberto's sudden decision to turn in petitioner after Jerry's death could not have been spurred by the realization that he no longer had to protect his dead brother from police involvement: Norberto continued to protect Jerry even after Jerry's death.

Benjamin's later confession to the robbery/homicide was not then "spontaneously blurted out" (Resp. Br. p. 29) in an attempt to aid the police. Rather, as the government points out (*Amicus* Br. pp. 4 n.6, 14), Benjamin told the police about the robbery/homicide in a desperate effort to get himself off the hook for the Jerry Cruz homicide. To convince Wood that he was not the type of person to deny killing a man if he had done so, he bragged that he had killed a gas station attendant who had shot his brother (H. 7). Only when Wood then gave Benjamin his *Miranda* warnings for the robbery/homicide did Benjamin—who had no prior familiarity with the law (H. 75) and the mentality of a 5-year-old child (H. 66)—realize that his attempt to exculpate himself from the Jerry Cruz homicide had inculpated him in another case. He then became angry, wanted to go home, and told both police officers that he would shoot them if he could (H. 10, 31).

Benjamin later confessed on videotape to the robbery/homicide and named petitioner as one of the holdup team. Respondent argues that his naming of petitioner was reliable because Benjamin, in a display of "fraternal loyalty," heaped all the blame on himself. Respondent also speculates that Benjamin was unaware of the intricacies of the felony murder statute and therefore inculpated his brother only unwittingly (Resp. Br. pp. 30-31). As respondent also concedes, however, Benjamin's version of events showed that he acted solely "in defense of his brother" (Resp. Br. p. 30). And, if, as respondent claims, Benjamin was not familiar with New York's felony murder law, then he also did not know that self-defense is not a defense to felony murder. Thus, rather than realizing that he was heaping all the blame on himself, Benjamin obviously thought at the time that he was exculpating himself by way of self-defense, and inculpating his

brother, who, as he was quick to accuse, had demanded the money, threatened the attendant, assaulted the attendant, and fired the first shot at him—all in furtherance of a robbery and not in self-defense (J.A. 63-67).[7]

In sum, the hearing evidence injected into this appeal by respondent actually supports the view that Benjamin's videotaped confession was the culmination of his slow-witted attempts to convince the police that he was innocent of the Jerry Cruz murder. Benjamin did not realize that his confession was against penal interest when he made it. It was not until much later that Benjamin would realize that his attempts at self-exculpation were illusory, that he had unwittingly heaped blame on himself.

Furthermore, once Benjamin realized that his statements to the police had not exculpated him, he then, at the hearing, redoubled his efforts to save himself at petitioner's expense. He testified that his videotaped confession was a lie; that he, Benjamin, had no part in the crime; that he learned of the crime from petitioner, who *was* one of the robbers; that petitioner had threatened him to keep quiet; and that petitioner had killed Jerry Cruz (H. 81-84, 97-98, 105). This testimony gives the crowning blow to any assertion that Benjamin felt "fraternal loyalty" toward petitioner.

Moreover, this evidence of Benjamin's motivation to cast blame on petitioner came out at the hearing despite

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[7] It is also worth noting that the police had already been advised, by Norberto, of petitioner's alleged involvement in the robbery/homicide, so that Benjamin's inclusion of petitioner in his version could very well have been a slow-witted attempt to curry favor. Indeed, the videotape reveals that it was the assistant district attorney who first brought up petitioner's name ("Chino") during that confession (J.A. 62).

the fact that petitioner's counsel took no part in it. He took no part because that motivation was then irrelevant to his case, as the resultant videotaped confession was not being offered as evidence against his client; the hearing was addressed solely to the unrelated question of the voluntariness of that confession. Had counsel had reason or opportunity to do so, he might very well have explored and clarified that motivation further, as well as other factors belying the reliability of Benjamin's accusations against petitioner, at the hearing level, so that the court could make an evidentiary ruling on a full record.[8] If Benjamin's confession were deemed admissible as substantive evidence against petitioner, then counsel could have put before the jury (*see Crane* v. *Kentucky*, 476 U.S. ___, 106 S. Ct. 2142 (1986)) the evidence that came out at the hearing tending to show that Benjamin inculpated petitioner in an effort to exculpate himself from the Jerry Cruz homicide.[9]

Thus, even the limited record developed for unrelated reasons, without counsel's participation, cannot overcome the heavy presumption of unreliability, set forth in *Lee* v. *Illinois*, 106 S. Ct. at 2056, of Benjamin's confession as evidence connecting petitioner to the crime.

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[8] The incompleteness of the record as to Benjamin's motives in inculpating petitioner distinguishes this case from *Lee* v. *Illinois*, 106 S. Ct. at 2056, where Lee's codefendant's motives to shift blame to Lee were explored on the record. *See id.* at 2064.

[9] The jury also never heard that Benjamin and Norberto gave two different sets of *dramatis personae* to the police, and that Norberto must have known that petitioner was a suspect in the Jerry Cruz homicide, since everyone else knew it (see footnote 6, p. 9, *ante*).

C. No Independent Objective Evidence, Other Than Norberto's Suspect Testimony, Corroborates The Videotape's Linkage Of Petitioner To The Crime.

Respondent argues that the codefendant's videotaped assertions connecting petitioner to the crime were corroborated by independent objective evidence (Resp. Br. p. 20). Specifically, respondent points to petitioner's blood stained bandage seen by Norberto on the day of the crime (Resp. Br. pp. 23, 26, 27 n., 43 n.2) and petitioner's "adoption" by silence of Benjamin's statements to Norberto after the crime (Resp. Br. pp. 23, 31-32).[10] This evidence is independent and objective only if one assumes as a given, as respondent does, that Norberto's testimony about petitioner's visit to him after the crime was truthful. Petitioner's contention has always been, however, that he never made that visit (*e.g.*, J.A. 51, 56; Pet. Br. pp. 27-29). The bloody bandage and the supposed adoption by silence are no more objective than Norberto's suspect claim that petitioner confessed at all.

Respondent also argues that petitioner's confession itself independently corroborates Benjamin's videotaped

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[10] Norberto's testimony at the second trial that Eulogio [petitioner] confessed was impeached by his testimony at the first trial that, during the alleged visit, Norberto "asked Chino [Eulogio] what had happened, Benjamin spoke" (J.A. 50). In their briefs, the State and the government make skillful use of additional excerpts from the first trial in an attempt to rehabilitate Norberto's credibility (Resp. Br. p. 45 n., *Amicus* Br. pp. 24-25 n.25). Had the prosecutor at the second trial been as skillful, he might also have attempted to rehabilitate Norberto in this manner. Since he was not (J.A. 51), the only evidence of the first trial that came before the second jury was the impeachment, not the attempted rehabilitation, and it is therefore only the impeached testimony which can be considered by this Court as part of the record below.

accusations against petitioner (Resp. Br. p. 24). Again, respondent assumes as a given that this supposed oral confession to Norberto was made. Moreover, in arguing the reliability of this "independent" evidence, respondent points to the "minute" detail in petitioner's alleged confession and how consistent that detail was with the "photographic, ballistic, and forensic" evidence (Resp. Br. pp. 25-27, 50). The one major detail contained in that alleged confession, however—the firing of only one shot (see Resp. Br. pp. 6, 31 n.)—is inconsistent with the physical evidence that the attendant received *two* bullet wounds. Thus, to the extent that petitioner's alleged confession contained any "detail," it was inaccurate. Furthermore, while the "photographic, ballistic, and forensic" evidence may have corroborated Benjamin's confession to his own involvement in the crime, not one iota of it corroborated that portion which implicated petitioner in it.

Contrary to respondent's claims, therefore, Norberto's dubious testimony was the only evidence which corroborated Benjamin's videotaped assertions that petitioner was present at the robbery/homicide.

D. Respondent's Assertion That There Would Have Been No Practical Value To An Opportunity By Petitioner To Cross-Examine Benjamin Is Belied By The Record.

Citing to the codefendant's testimony at the pretrial hearing, the State and the government argue that Benjamin's videotaped accusations against petitioner were so reliable that any opportunity for petitioner to cross-examine Benjamin would have been without practical value, "dubious," and "unhelpful" (Resp. Br. pp. 28, 35; *Amicus* Br. p. 17 n.18). The hearing testimony shows exactly the opposite to be true.

As previously noted (p. 11, *ante*), Benjamin testified at the hearing that his videotaped confession was false; that

he, Benjamin, had no part in the crime but learned of it from petitioner, who *was* one of the robbers; that petitioner had then threatened him; and that petitioner had killed Jerry Cruz. Had Benjamin testified at petitioner's trial, petitioner's counsel could have made great use of this prior testimony in impeaching Benjamin.

If Benjamin testified consistently with the videotaped confession, petitioner would have been allowed to impeach that testimony by using the hearing testimony as a prior inconsistent statement. *See People* v. *Wise*, 46 N.Y.2d 321, 326, 385 N.E.2d 1262, 1265 (1978). Alternatively, had he testified consistently with his hearing testimony, petitioner could have impeached him with the videotaped confession. And, had Benjamin given yet a third version of events, petitioner could have impeached him with both prior statements. This cross-examination strategy would have demonstrated to the jury that Benjamin was not above giving false testimony. The jury would then have been instructed that if it disbelieved any portion of Benjamin's testimony (for example, his false disclaimers), it was entitled to reject his entire testimony (including his accusations against petitioner). *See* New York Criminal Jury Instructions, § 7.06 (1983).

Such cross-examination would also have dispelled the aura of "fraternal loyalty" that, according to respondent, surrounded Benjamin's videotaped confession. The jury would have learned of Benjamin's willingness to implicate his brother to serve his own selfish purposes. And, while the jury had the opportunity to observe Benjamin's demeanor in the videotape, Benjamin would have made a far worse witness when subjected to cross-examination, as he was at the hearing. Respondent correctly describes Benjamin's hearing testimony under cross-examination as "fraught with inconsistencies" and "inherently

unbelievable" (Resp. Br. p. 28). Also, cross-examination of Benjamin would have added support to counsel's argument that petitioner was under suspicion for the death of Jerry Cruz, and that Norberto's testimony was biased for that reason. Finally, under New York law, the jury would have been instructed to scrutinize Benjamin's testimony with extra care.[11]

In short, cross-examination would have shown the jury that Benjamin's videotaped accusations were not the dispassionate and unbiased statements of a loving brother. Rather, petitioner could have revealed them as the biased accusations of a demonstrated liar. Clearly, this opportunity would have been of tremendous "practical value." *Parker* v. *Randolph*, 442 U.S. 62, 73 (1979).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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[11] Where the evidence establishes a witness as an accomplice to the defendant, New York law requires the jury to be instructed that the witness's testimony must be corroborated by independent evidence materially *connecting the defendant with the commission of the crime*. *See, e.g., People* v. *Duncan*, 46 N.Y.2d 74, 79, 385 N.E.2d 572, 575 (1978).